

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA**

MISC. LAND APPLICATION NO. 11 OF 2020.

(Arising from the Decision of the Court of Resident Magistrate of Mbeya, at Mbeya in Extended. Jurisdiction Land Appeal No. 38 of 2019, Originating from the District Land and Housing Tribunal for Mbeya, at Mbeya in Land Application No. 140 of 2013).

**SIMON MASASI (Administrator
of the estate of the Late Dunstan**

Philip Masasi.....APPLICANT

VERSUS

1. MWASHONA VILLAGE COUNCIL.....1ST RESPONDENT

2. FROLA MBASA.....2ND RESPONDENT

3. MBASA SANGA.....3RD RESPONDENT

RULING

01/10 & 14/12/2020.

Utamwa, J.

This is an application for leave to appeal to the Court of Appeal of Tanzania (CAT). The applicant SIMON MASASI (Administrator of the estate of the Late Dunstan Philip Masasi) preferred the application under sections 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141, R. E. 2002 (Now R. E 2019), hereinafter called the AJA and 47 (2) of the Land Disputes Courts Act, Cap. 216 R.E 2002 (Now R. E. 2019), henceforth the LADCA, as amended by the Written Laws (Miscellaneous Amendment) Act, No. 3 of

2018. The application was supported by an affidavit sworn by the applicant himself. The respondents objected the application through a counter affidavit sworn by Mr. James Bendon Kyando, learned counsel.

When the matter came for necessary orders, I noted that, the applicant is applying for leave to appeal to the (CAT) against a decision made by a Senior Resident Magistrate with Extended Jurisdiction (SRMEJ), sitting in the Court of Resident Magistrate of Mbeya, at Mbeya. I thus, hesitated to entertain the application since the decision to be appealed against was not made by this court.

I thus, invited the parties to address me on the following issues:

- (i) Whether or not in law, this court can entertain an application for leave to appeal to the CAT against a decision made by the SRMEJ sitting in the Court of Resident Magistrates.
- (ii) If the answer to the first issue is negative, then whether or not this application is competent before this court.
- (iii) Depending on the answers to the two preceding issues, which orders should this court make?

The parties agreed, and the court ordered them to argue the issue by way of written submissions. The applicant was represented by Mr. Felix Kapinga, learned counsel who held briefs for Mr. Magoyega, learned advocate with leave to proceed. On the part of the respondents, they were represented by Mr. Kyando, learned counsel as hinted earlier.

When the scheduling order for filing the written submissions was fixed by the court, the applicant and his counsel failed to file their written

submissions in chief timely. Both sides were afforded an opportunity to argue on the effect of the non-compliance with the scheduling order. The court then decided that, it would not consider the applicant's submissions in chief for the reasons adduced in the ruling dated 1st October, 2020. I will therefore, proceed to decide the issues posed above by considering the respondents' arguments, the record and the law. I will consider the law irrespective of the failure by the applicant to comply with the scheduling order because, it is a firm and trite principle of our law that, courts of law are enjoined to decide cases according to law and the constitution. This stance of the law is indeed the very spirit underscored under article 107B of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (the Constitution). This was also an emphasis in the case of **John Magendo v. N.E. Govan (1973) LRT n. 60.**

In his submissions regarding the issues raised by the court, the learned counsel for the respondent argued that, this court lacks jurisdiction to entertain the application at hand. This is because, it did not make the decision to be appealed against. The application can only be entertained by a Resident Magistrate with extended jurisdiction since the impugned decision was made by the SRMEJ. The reasons for this contention were that, though section 47 (2) of the LADCA gives powers to this court to grant leave to appeal to the CAT, the appeal related to the application at hand had previously been transferred by this court to the SRMEJ for determination under section 41A (1) and (2) of the LADCA as amended by the Written Laws (Miscellaneous Amendment) (No. 3), Act, 2018. Under these provisions, the SRMEJ was entitled to determine the appeal before

him and he was deemed a judge of this court. His court was also deemed the High Court. He further argued that, section 11 (1) of the AJA empowers a Court of Resident Magistrate with extended jurisdiction to entertain an application for extension of time to apply for the leave to appeal to the CAT out of time. This legal arrangement implies also that, such court is also empowered to entertain the actual application for leave to appeal to the CAT where a decision to be appealed against was made by a Resident Magistrate with extended jurisdiction.

Owing to the above reasons, the learned counsel for the respondent urged this court to determine the first issue raised by the court negatively that, this court cannot entertain the application at hand. As to the second issue, he pressed this court to hold that the application is incompetent. In answer to the third issue, he opined that, the court should dismiss the application for want of jurisdiction.

The learned counsel for the respondent further prayed for the applicant to be condemned to pay costs of this application though the matter was raised by the court *suo motu*. This is because, the law guides that costs follow event and the respondent indeed incurred some costs in this matter.

I have considered the arguments by the learned counsel for the respondent, the record and the law. I will now test the first and second issue cumulatively since they are interrelated. Indeed, it is common ground that the intended appeal to the CAT is against a decision made by the SRMEJ. I also agree with all the arguments advanced by the learned counsel for the respondent and the provisions he cited. Actually, since the

appeal related to the application at hand had previously been transferred to the SRMEJ for determination, the Court of Resident Magistrate presided over by a Resident Magistrate with extended jurisdiction is empowered to entertain the application at hand. That court is actually a deemed High Court and the Resident Magistrate with extended jurisdiction is deemed a judge of the High Court.

Again, I agree with the contention by the learned counsel for the respondent that, section 11 (1) of the AJA vests jurisdiction in a Court of Resident Magistrate with extended jurisdiction to entertain an application for extension of time to apply for leave to appeal to the CAT out of time against a decision made by it. Now, though there are no express provisions of law vesting jurisdiction in such court to entertain the actual application for leave to appeal to the CAT under such circumstances, it is apparent that, the legislature had intended to give such court powers to entertain the actual application for leave to appeal to the CAT under such circumstances. In my settled view, it is our practice that, a court with powers to extend time for doing an act, has also powers to entertain an application for doing the actual act. It is in fact, in my settled opinion, illogical for the law to give powers to a court for entertaining an application for extension of time to do an act without granting it powers to entertain the application for doing the actual act.

The legislature expressly embodied the spirit just highlighted above in some pertinent statutory provisions. The provisions of section 14 of the Law of Limitation Act, Cap. 89, R. E. 2019 (the LLA) constitute a good example of such spirit. These provisions give powers to a court to extend

time for appealing or making an application out of time. On the other side, section 14 (2) defines the term “court” as the court having jurisdiction to entertain the appeal or application, as the case may be. These provisions thus, explain better the spirit that, a court with powers to extend time for doing an act out of time also has powers to entertain an application for performing the actual act as observe above.

The views highlighted above were cemented by the CAT in the case of **Kessy Raymond Kimwaga v. Bi. Moshi Omary, Civil Application No. 121/03 of 2019, CAT at Dodoma** (unreported). In that case, the CAT considered a matter related to an application that had been filed before this court for leave to appeal to the CAT though the decision to be appealed had been made by a Resident Magistrate with extended jurisdiction. The CAT held that, this court has no jurisdiction to entertain an application of that nature. I also recently underscored the above highlighted guidance of the CAT in the case of **Willy Mwashivala v. Vivtoria Shega, Misc. Land Application NO. 5 OF 2020, High Court of Tanzania (HCT), at Mbeya** (unreported order made on 25/11/2020), and I reiterate the emphasis in the matter at hand.

It must however, be noted at this juncture that, the decision in the **Kessy case** (supra) was based on the provisions of section 5(1)(c) of the AJA in relation to a civil case that had originated in a District Court. The matter at hand, is related to the provisions of section 47 (2) of the LADCA which carter for leave to appeal to the CAT in land matters. This matter also originated in a District Land and Housing Tribunal. Nonetheless, the provisions of sections 5 (1)(c) of the AJA are *in pari material* with those of

section 47 (2) of the LADCA in that, they all deal with the same subject matter related to the requirement for leave to appeal to the CAT against decisions of the High Court. The phrase "*in pari materia*" means "on the same subject" or "relating to the same matter;" see The Black's Law Dictionary, 9th Edition, West Publishing Company, St. Paul, 2009, at page 862. It is trite principle that, in common law jurisdictions, statutes which are in *pari materia* are interpreted similarly; see the guidance by the CAT in the case of **Tanzania Cotton Marketing Board v. Cogecot Cotton Company SA [1997] TLR 165**.

It follows thus that, the construction of the provisions of section 5(1)(c) of the AJA which applied in the **Kessy case** (supra) is similar to the interpretation of section 47(2) of the LADCA which applies to the matter at hand. This explains that, the guidance made by the CAT in the **Kessy case** (supra) applies *mutatis mutandis* in the case at hand. In this matter therefore, I am enjoined to follow the holding in the **Kessy case** (supra). It is more so because, decisions made by the CAT bind courts and tribunals subordinate to it, including this court. This position of the law is by virtue of the doctrine of *stare decisis*; see the decision by the CAT in **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda Cha Uchapishaji cha Taifa [1988] TLR. 146**.

Owing to the reasons shown above, I answer the first issues posed above negatively that, this court cannot entertain the application at hand. The second issue is also answered negatively that, the application at hand is incompetent for being before a wrong court. These findings trigger the examination of the third issue.

The answer to the third issue is also available in the guidance of the CAT through the **Kessy case** (supra). In that case, the CAT held that, where this court discovers that an application of this nature has been filed before it, it has to place the matter before an appropriate authority for necessary order of transfer to a Resident Magistrate with extended jurisdiction for determination. Actually, according to the practice in our jurisdiction, such appropriate authority is the Judge in-charge of a given registry or division of this court. The Judge in-charge transfers a case by way of assigning or re-assigning it to a specific Resident with Extended Jurisdiction. In the matter at hand therefore, I am obliged to place this matter before the Judge in-charge of this court for the purpose of the transfer. This finding constitutes an answer to the third issue.

Regarding the issue of costs, I will not go along with the learned counsel for the respondent. The general rule on costs is clear and trite that, costs are awarded at the discretion of the court, they follow event unless the court has good reasons to be recorded by it, for deciding otherwise; see section 30 of the Civil Procedure Code, Cap. 33 R. E 2002 as construed by the CAT in the case of **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co. Ltd (1995) TLR. 205.**

In the matter at hand however, I have already made a finding that, the legal remedy is to place this matter before the judge in-charge of this court for purposes of transferring it to a specific Resident Magistrate with extended jurisdiction for determination. This means that, though this court will no longer be seized with the control of the matter upon the intended transfer that will not mark the end of the matter. This is because, the same

will remain pending before the magistrate to whom the transfer will be ordered. This in my view, is a good reason why this court should not order costs to follow the event as the general rule on costs requires. It is thus, suitable, at this stage, to only order for costs to be in the course so that the issue on costs will be determined by the Magistrate to whom the transfer shall be made.

Due to the reasons shown above, I hereby direct the Deputy Registrar of this court to forward this matter to the Judge in-charge of this court for him to consider exercising his powers for transferring this application to a specific Resident Magistrate with extended jurisdiction as per the law. The issue of costs in this matter shall thus, be determined by the Resident Magistrate with Extended Jurisdiction upon the transfer being effected. It is so ordered.



J.H.K.UTAMWA
JUDGE
14/12/2020

14/12/2020.

CORAM; J. H. K. Utamwa, Judge.

Applicant: present in person.

Respondents: Mr. Lingo (chairman of 1st Respondent) and Mr. Kyando, advocate.

BC; Mr. Patrick, RMA.

Court: ruling delivered in the presence of the applicant, Mr. Lingo Mwenda (chairman of the first respondent) and Mr. Kyando, counsel for all the respondents, in court, this 14th December, 2020.

J. H. K. UTAMWA
JUDGE
14/12/2020.